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FEDERAL COMMUNICATIONS COMMISSION
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Before The
Federal Communications Commission
Washington, D.C.

In the Matter of

Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	))))	MM Docket No. 92-266

To the Commission:

JOINT COMMENTS IN RESPONSE TO <u>FIFTH NOTICE OF PROPOSED RULEMAKING</u>

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Summary

The Commission's efforts in the Third Reconsideration Order, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking[1] to achieve a balance between further reductions to existing rates and the creation of meaningful economic incentives on a going forward basis are flawed in two critical respects. First, the incentives provided are wholly inadequate to stimulate programmers to develop new product and to encourage cable operators to provide that product to their customers. Second, the incentives provided are artificially skewed towards certain types of programming, accordingly, cable operators will be more likely to make programming decisions on economic, rather than content-based, grounds. Neither result serves the public interest.

Additionally, the Commission has failed to recognize and rectify procedural barriers in its rate regulation process which thwart the achievement of desired going forward objectives and provide further disincentives to the development of a healthy and robust programming market. Specifically, the Commission should not permit franchise authorities to delay the implementation of pass through adjustments for cost increases and inflation and should not

[1] Second Order on Reconsideration, Fourth Report and Order and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, __ FCC Rcd __ (March 30, 1994) (hereinafter "Fourth Report" or "Fifth NPRM").

allow the reopening of previously unchallenged tier rates simply because of a pass through adjustment Moreover, the going forward rules must, but currently do not, take into account certain real external costs which further deplete the economic resources of cable operators. Finally, regulation of commercial rates and channels in excess of 100 is neither necessary or appropriate.

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JOINT COMMENTS IN RESPONSE TO FIFTH NOTICE OF PROPOSED RULEMAKING

Providence Journal Company,[1] Sammons Communications, Inc., MultiVision Cable TV Corp., and ParCable, Inc., (hereinafter "Joint Parties"), by their attorneys, hereby submit their Joint Comments in response to the above-captioned Fifth Notice of Proposed Rulemaking. Each of the Joint Parties is an owner and operator of cable television systems; additionally, Providence Journal Company, as a founding partner of the Television Food Network, has a significant interest in a cable programming service. Each of the Parties has participated in the various rounds of the Commission's rate regulation proceedings. Accordingly, each of the Joint Parties is directly and substantially affected by the Commission's rate regulation rules and is vitally concerned that those rules do not operate to constrain the ability of cable operators and programmers to provide new and

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[1] Providence Journal Company conducts its cable television operations through its subsidiaries Colony Communications, Inc. and King Videocable Company.

innovative services to the public, to invest in the development of programming and new technologies and to compete vigorously and effectively with other video service providers.

The Joint Parties urge the Commission to carefully consider and adopt the constructive recommendations and solutions proposed herein; to do otherwise will simply prolong the current uncertainties and de facto freeze which have for all practical purposes stymied the growth of cable programming and cable operators.

I. THE COMMISSION'S SUBSTANTIVE GOING FORWARD RULES DO NOT ADEQUATELY PROVIDE FOR RECOVERY OF CURRENT COSTS AND FUTURE INVESTMENT.

The Commission's initial Rate Order in this proceeding characterized the challenge of the 1992 Cable Act as:

> . . . how to preserve and extend the benefits of increased investment, programming diversity and technical innovation that cable provides while protecting subscribers from noncompetitive rate levels.[2]

The "protecting subscribers" branch of the challenge has clearly been addressed by the additional seven percent reduction in rates for most operators; the remaining challenge -- "to preserve and extend the benefits" of cable, including programming diversity -- has clearly not yet been met.

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[2] Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5638-39, ¶ 7 (1993) (hereinafter "Rate Order").

A. Greater Economic Incentives, on A Regulatory Neutral Basis, Are Needed to Stimulate the Development of Programming and the Addition of New Channels of Service.

Congress has expressly and approvingly recognized that cable plays an important role in furthering the substantial national interest in programming diversity. The 1984 Cable Act had as a stated purpose to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public";[3] that objective was echoed in the Statement of Policy of the 1992 Act:

> . . . ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems.[4]

Similarly, in its 1990 Report to Congress in the Cable Act Inquiry, the Commission explicitly found that:

> Deregulation under the Cable Act has fostered the intended results: increases in investment, with corresponding expansion of cable reach, numbers of subscribers, channel capacity and new programming.[5]

The Fourth Report attempts to address these objectives by providing for a pass through of increased programming

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[3] Cable Communications Policy Act of 1984, Section 601(4).

[4] Cable Television Consumer Protection and Competition Act of 1992, Section 2.

[5] Report, MM Docket No. 89-600, 5 FCC Rcd 4962, 4971 (1990).

costs, a mark-up on programming costs and an adjustment to the benchmark rate as network capacity is increased. While the Commission has attempted to address incentives for programming, it has done so in a manner which creates an imbalanced playing field and thereby disadvantages low cost and no cost programming. Whatever incentives are provided, and it is apparent that the current incentives are inadequate, must be done in a manner which maintains regulatory neutrality between services based primarily or solely on license fees and those based primarily or solely on advertiser support. To do otherwise, as does the Fourth Report, simply forces the cable operator to game the system to maximize its economic interest regardless of whether that decision enhances program diversity or satisfies viewer preferences. The adverse impact of the current cost plus percentage approach falls most heavily on services, and particularly start-ups, which are primarily or solely advertiser supported thus undermining the viability and vitality of channels which could be offered to subscribers at lower cost.

A number of parties have advanced proposals to the Commission in petitions for reconsideration of the going forward adjustments established in the Fourth Report. The Joint Parties are of the view that many of these proposals have merit, in whole or in part. What emerges most clearly from these proposals is the difficulty in crafting a regulatory solution which replaces the harmonious balance of a variety of approaches produced by a dynamic and healthy marketplace. As previously noted, the Commission has pointed favorably to the explosion of diverse programming sources resulting from deregulation under the 1984 Act; from 67 program services in 1984 to over 200 existing and planned services in 1994.[6] No single characteristic defines the economic structure and base of these services; some programmers rely heavily on licensing and subscription fees, other rely predominantly or only on advertising revenues, home shopping services look to sales revenues and share commissions with operators, and premium and pay-per-view channels are marketed on an a la carte basis with, typically, higher subscriber fees. Operators choose to add some or all of those forms guided principally by editorial discretion and their perception of value to the customer; that is precisely how the present strength and diversity of cable programming was built -- by marketplace acceptance without artificial regulatory intervention. Whatever Congress may have intended in its adoption of the 1992 Cable Act, it clearly did not intend to force all programmers -- whether existing or new and of whatever content and format -- into a monolithic single form of dealing with cable operators and the public.

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[6] 53 Television & Cable Factbook, Cable & Services at 166-71 (1985 ed.) and 62 Television & Cable Factbook, Services at G70-88 (1994 ed.).

The diversity of economic arrangements heretofore available to the cable programming industry has contributed greatly to the diversity of its content; the Commission must, therefore, be extremely careful in the pursuit of its narrow rate regulation objectives that it not inadvertently undermine broader public interest goals and benefits.

An inherent effect of any regulatory scheme, no matter how well-intentioned, is that it inhibits to some degree the opportunities for experimentation and choice which exist in the marketplace. Accordingly, the Commission's going forward incentives must strive to replicate those opportunities to the greatest possible extent. Thus, for example, while a cost-based markup may be perfectly adequate and appropriate for certain services, it is demonstrably insufficient, and indeed counterproductive, for others. The Joint Parties urge the Commission to consider and adopt an alternative which will, as closely as possible, place all programming services on an equal competitive footing. Retention of the current cost-based approach, with an improved percentage mark-up, should be coupled with a flat-fee alternative. In that regard, the Joint Parties support proposals for a fixed amount per channel with an aggregate annual cap, plus increases in licensing fees and other programming costs.

B. The Commission's Rate Regulation Rules Should Also Be Neutral with Respect to the Manner in Which Programming Is Offered

Just as the Commission's economic incentives should have a regulatory neutral impact on a cable operator's decision to add or continue to provide a particular program service, so too should its regulations operate in a neutral fashion with respect to the manner in which that programming is offered. While the Act requires Commission intervention in consumer protection issues such as negative option marketing and evasions of rate regulation, governmental involvement beyond those types of concerns would appear to be unwarranted. Clearly there is debate, on policy and other grounds, as to whether the cable viewing audience is better served by a single, all-inclusive package of services at a fixed price or by options and choices at a variety of prices, including discounting for packages. What often gets lost in the debate, however, is whether, in the absence of clearly defined consumer protection concerns, that determination is an appropriate one for government to make. Simply put, the question is who should decide whether a particular program service which is of interest to only some of a system's subscribers should be added to the universal level of service with the cost shared by all subscribers or provided only to subscribers who desire it and are willing to pay a higher price. To state the question is to demonstrate the undesirability of regulatory interference in a fundamental programming decision; clearly the preferable approach is to leave the decision to the interaction of cable operators, programmers and consumers -- a marketplace solution.

The Joint Parties recognize, however, that the Commission does not have the luxury of dealing with this issue on a clean slate. The advent of comprehensive rate regulation, and subsequent refinements to that regime have, through the interjection of regulatory forces, resulted in departures from traditional programmer--operator relationships and historical models of program offerings. In particular, a la carte offerings have become more widespread and are the subject of on-going Commission review. While the Joint Parties believe, as previously noted, that the Commission's role in this area should be relatively narrowly limited to specific consumer protection concerns and abuses of the rate regulation rules, they nonetheless acknowledge that further Commission guidance with respect to both existing and future practices would be useful and appropriate. To that end the Parties would welcome clarification on the manner in which unregulated a la carte services may be added or returned to regulated levels of service. Similarly, with regard to existing a la carte offerings, the Joint Parties submit that it would be desirable for the Commission to establish general principles, either through the pending Letters of Inquiry or through this proceeding of general applicability. Accordingly, the Joint Parties urge the Commission to sanction existing a la carte arrangements undertaken in good faith in reliance upon the guidance contained in the Rate Order and in further clarifications and interpretations issued by the Commission and staff, in the absence of clear evidence of abuse; at a minimum, the Commission should permit such arrangements to be restructured without penalty should the operator be required or choose to do so. The Commission's general principles should likewise govern the parameters of permissible a la carte offerings on a prospective basis. The fundamental guiding principle must be that the Commission's economic regulation maintain absolute neutrality so as not to induce or reward differing treatment for various types of programming for solely economic reasons; beyond that, there is little, if any, role for government to play.

C. No Distinction Should Be Made For Systems With Greater Than 100 Regulated Channels

The Fifth NPRM asks for comment on the appropriate form of economic regulation for systems with greater than 100 regulated channels of service. The Joint Parties are of the view that systems with greater than 100 channels, which presumably will structure this additional capacity as separate tiers or levels of service, should not be regulated as to those packages. Moreover, as a practical matter, as systems expand capacity and reach the 100 channel plus range, an increasing percentage of those channels will be used for pay-per-view, video on demand, multiplexing and other unregulated services. The more important question is whether there will be adequate incentives and compensatory mechanisms to drive the capital investment that upgrades and rebuilds to achieve 100 plus channels will require. Resolution of that critical issue is better suited to petitions for reconsideration dealing with system improvements under both the benchmark and cost-of-service regimes.

Assuming that the regulatory structure approximates the marketplace risk/reward calculus for network expansions and that channel capacity increases by this order of magnitude, the Parties believe that if such channels are to be subject to rate regulation, the principle of regulatory neutrality should be preserved. If the marketplace will not accept 100 plus channels of regulated service at whatever the appropriate price is determined to be, cable operators and program suppliers will adjust their behavior accordingly. It is imperative that government not substitute its judgment for this process; accordingly, the going forward incentives should be improved across-the-board without regard to the number of regulated channels offered by the system.

D. The Commission Should Not Undertake to Regulate Commercial Rates

The final question posed by the Fifth NPRM is whether and how commercial rates should be regulated; in particular the NPRM asks whether higher rates for commercial establishments should be offset by lower rates for other subscribers. The Joint Parties do not believe that regulation of commercial rates is required by the Cable Act nor is it appropriate or necessary as a matter of regulatory policy.

Entirely different economic considerations apply to the provision of service to establishments such as bars and restaurants and transient accommodations such as hotels and motels. Owners and operators of commercial establishments purchase cable not just for their personal viewing pleasure but because it enhances the value of their business; one has only to note, for example, the practice of motels which advertise on roadside signs the various cable services that they offer. Also significant is the fact that commercial establishments have available to them ready substitutes for conventional cable service. Such establishments can and do obtain privately owned satellite dishes; other alternatives include national distributors such as Spectradyne and Comsat and local video suppliers such as MMDS and SMATV operators. In short, commercial establishments do not present the same policy issues which led to the adoption of legislation aimed at protecting residential cable consumers and there is no requirement or compelling policy justification for regulation of the rates charged to such establishments.

It would be equally inappropriate, in response to the question posed in the Fifth NPRM, to require that unregulated commercial rates cross-subsidize the rates for regulated subscribers. The Commission's benchmark scheme focuses on regulated revenues per subscriber and generally does not take into account revenues from unregulated services and sources. Moreover, the comparison of rates for "competitive: and "noncompetitive" systems, which underpins the Commission's determination of a reasonable benchmark rate, does not contemplate a lower regulated rate as a function of nonregulated revenue. In sum, commercial rates are effectively set by the market and should not be subjected to regulation.

E. The Going Forward Adjustments Should Permit Pass Through of Newly Adopted FCC Regulatory Fees

The 1992 Cable Act unambiguously identifies governmental taxes and fees as a cable industry cost which the Commission must take into account in formulating its rate regulation rules; such fees include:

> . . . the reasonably and properly allocable portion of any . . . fee, tax or assessment of general applicability imposed by a governmental entity

> applied against cable operators or cable subscribers.[7]

As the Act's accompanying legislative history observes, itemization and pass through of governmental fees serves to inform consumers that some portion of their monthly cable bill is attributable to costs imposed on the cable operators by regulatory authorities.

> The fact is that sometimes rates have gone up because of hidden, unidentified increases in fees or taxes which the cable [company] has to pay and . . . passes on to the consumers . . . .[8]

Precisely the same considerations of accountability apply to the newly imposed federal regulatory fees; on top of the drastic reduction in the cable industry's revenues and cashflows imposed by comprehensive rate regulation, the federal government now requires the cable industry to contribute an estimated $21,000,000 in per subscriber fees and a significant additional amount in CARS, TVRO and business radio license fees for FY 1994. Pass through of these fees to subscribers is particularly appropriate inasmuch as they are the ultimate beneficiaries of the Commission's pervasive cable regulatory regime.

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[7] Section 623(b)(2)(C)(v) of the Act; 47 U.S.C. § 543(b)(2)(C)(v).

[8] Rate Order, 8 FCC Rcd at 5967, ¶ 545 (1993) citing 138 Cong. Rec. S569 (January 29, 1992) (remarks of Senator Lott on introducing eventual final version of Section 622(c)).

In its determination to allow full pass through of both existing and increased franchise fees, the Commission noted that the competitive benchmark levels derived from the benchmark formula and survey data would not include franchise fees.[9] Similarly, the cable industry's September 30, 1992 ratebase, upon which the benchmarks were constructed, will not reflect these recently adopted fees. Inasmuch as FCC regulatory fees, like franchise fees, are external costs beyond the operator's control, are not reflected in existing cable industry rates and ultimately benefit the public, full pass through treatment is required by the Act and consistent with Commission precedent.

II. PROCEDURAL BARRIERS TO THE FULL RECOVERY OF GOING FORWARD COSTS AND INCENTIVES SHOULD BE ELIMINATED

The Joint Parties commend the Commission for its recognition of the importance of adequate going forward incentives. Once those incentives are fully in place, the Commission must ensure that their benefit is not delayed or denied through the rate regulation process. Of utmost importance to both cable operators and programmers is predictability, certainty and finality; absent these elements of the process, the industry will be subjected to protracted proceedings and inconsistent rulings and will be unable to

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[9] Rate Order, 8 FCC Rcd at 5791, ¶ 256.

effectively price, package and promote new products and services.

A. The Commission Should Eliminate the Requirement for Prior Approval of External Cost Pass Throughs for the Basic Level of Service

In the Rate Order the Commission's preliminary treatment of the procedural aspects of pass through adjustments instructed that such adjustments should not and would not require the same level of scrutiny and analysis as the establishment of initial rates; accordingly, the Commission characterized such adjustments as "automatic" and declared that such review should be limited in scope and must be acted on within 30 days.[10] Notwithstanding its clear recognition of the appropriateness of a more expedited process for "automatic" adjustments, the Commission now appears to read Section 76.933 of the Rules as contemplating the same procedural process for both the establishment of initial rates and for subsequent adjustments for external costs and inflation; thus, rather than being required to act on such adjustments within 30 days, franchise authorities may, at the 30 day point, issue a tolling order of 90 days in benchmark cases and 150 days in cost-of-service cases. Assuming that the majority of going forward rates will be set by the FCC Form 1210 process rather than cost-of-service, and that

10 Rate Order, 8 FCC Rcd at 5720, ¶ 133 and n. 354.

franchise authorities will exercise their right to extend the process, operators will face roughly a 180-day gap between incurring a cost and actually receiving a compensatory rate increase. Upon completion of the 120-day review and approval process (and assuming no further delays caused by local procedures to establish an effective date), the cable operator must then activate its billing process and provide 30 days prior written notice to subscribers; in all, the process will have consumed close to 180 days.[11]

The Joint Parties strongly urge the Commission to revisit this process in conjunction with its review of regulatory incentives for the addition of new services. It makes no policy sense for the federal agency with primary regulatory responsibility for cable to recognize the value of expanded and enhanced program offerings and to construct appropriate incentives and rewards to achieve that result only to have those policies undone by the whim and caprice of non-federal authorities. The Commission should not underestimate the magnitude of this concern. Each of the Joint Parties has experienced at first hand the vagaries of the politically driven local rate regulation process and can

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[11] These estimates assume, of course, that the cost increase is incurred just prior to the commencement of a calendar quarter so as to permit the immediate filing of a Form 1210; to the extent the operator has no control over the timing of such costs, an additional delay of a full quarter could occur, thus lengthening the gap to approximately 270 days.

attest to the difficulties and delays encountered in obtaining rate increases, even as low as $.25 - $.50, to support the addition of new programming. Where the franchise authority is given absolute discretion to defer the impact of a rate increase on its constituents, it is naive to assume that it will not do so.

Accordingly, in view of the substantive difference between initial rates and subsequent external cost and inflation adjustments, the Joint Parties propose that increases of this type allocable to the basic level of service be treated the same as cable programming service tier complaints. The operator would be required to provide the 30-day advance notice of the proposed increase to both customers and the franchise authority but would not be required to obtain advance approval before implementing the increase. If the franchise authority determined that scrutiny of the proposed increase was warranted it could do so during the 30-day period and could, at any time during that period, order the operator to justify the proposed increase, subject to potential refund liability; the franchise authority should not, however, be able to preclude the automatic adjustment from going into effect. If the franchise authority concluded that the proposed increase was justified and warranted, it could simply acquiesce in the implementation of the rate by taking no action. The Joint Parties submit that this approach would alleviate the delay or loss of recovery of legitimate costs, would eliminate any possibility that franchise authorities could deny substantiated increases simply to prolong the delay by forcing the operator to appeal and would contribute greatly to the administrative efficiency and economy of the rate regulation process.

B. The Commission Should Not Revisit An Unchallenged Tier Rate Simply Because of External Cost Adjustment

Notwithstanding the Cable Act's unambiguous command that a complaint against an existing cable programming service must be filed within 180 days of the effective date of the Commission's rate regulation program, i.e. by February 28, 1994,[12] the Commission appears to be of the view that it may, in the context of reviewing an automatic adjustment, order a prospective reduction of a previously unchallenged rate.[13] The Parties submit that this conclusion is both wrong as a matter of law and unwise as a matter of policy.

Just as the wrong economic incentives will artificially and inappropriately influence cable operator programming decisions, so too will disincentives cause operators to weigh those choices in a manner which minimizes exposure to regulatory risk. If the addition of a higher priced service

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[12] Section 623(c)(3); 47 U.S.C. § 543(c)(3).

[13] Rate Order, 8 FCC Rcd at 5865-66, ¶ 375, n. 907.

can only be justified by a pass through of that external cost increase and the CPS tier rate has not previously been challenged, the operator will be extremely reluctant to open up an apparently settled rate structure for review and may choose either to not add the service or to opt for a differently priced service. Similarly, with respect to license fee-based services already on the system, the operator will be increasingly resistant to increases in existing program rates, thereby diminishing the ability of the programmer to reinvest revenues in maintaining or improving the quality of its programming. In either case the viewing public suffers.

Congress clearly intended to provide finality and certainty to cable programming service rates and interposed a jurisdictional bar against open-ended exposure to such complaints. It is entirely inappropriate for the Commission to attempt to circumvent that ban simply because it may perceive that an operator's unchallenged CPS rate may represent a windfall. Highly significant in this regard is the fact that, even with extensive media coverage of the FCC's rate regulation regime, consumer education programs around the country and Public Notices announcing the complaint deadline, only slightly over 10,000 tier complaints, including those which have been rejected, have been filed with the Commission. In instructing consumers on the procedures for filing complaints, the Commission did not require an allegation that the rate did not comport with the benchmark or any other calculation on the part of the subscriber; the subscriber was simply instructed that he could file a complaint if he felt his rates were too high. Even allowing for systems which do not have a tier or situations where the subscriber expected the franchise authority to protect his interests or simply for inertia in filing a complaint, a response of 10,000 plus complaints from a universe of 60,000,000 cable subscribers would strongly suggest that the overwhelming majority of consumers perceive their cable service as good value for the price. Accordingly, the Commission should reexamine its position and should limit its review of complaints filed after February 28, 1994 against increases in unchallenged CPS rates solely to the amount of the increase.

III. CONCLUSION

The Commission's Fourth Report correctly recognized the importance of encouraging the development of diverse program services; the means chosen to accomplish that end, however, fall short of the mark. To provide incentives which promote the addition or retention of programming in an even-handed way, the Commission should adopt a regulatory neutral flat fee per channel. Additionally, the Commission should ensure that once appropriate incentives are in place, their benefit must not be delayed or denied by the action of franchise authorities.

Respectfully submitted,

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